Supreme Court, U.S.
FILED
02 713 NOV 07 2002
OFFICE OF THE CLERK

No. 02-

IN THE
Supreme Court of the United States

BRIJ MITTAL, M.D.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CHERYL J. STURM
Attorney-At-Law
408 RING ROAD
CHADDS FORD, PA 19317
(484) 771-2000
Attorney for Petitioner

177163

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

71 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether, in the context of an extremely complex regulatory scheme, it was error for the district court to refuse a defense request for an instruction defining "willfulness" as the term was defined in *Ratzlaff v. United States*, 510 U.S. 135, 148, 114 S. Ct. 655, 663, 126 L. Ed. 2d 615 (1994), that is, as the intentional violation of a known legal duty?

II. Whether it was error for the district court to refuse a defense request to dismiss the indictment filed in the Southern District of New York on the grounds that all elements of the substantive offenses occurred in the Eastern District of New York?

III. Whether defense counsel was constitutionally ineffective for making promises in the opening statement that he had no chance of keeping, and for sleeping during the trial?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	ii
Table of Cited Authorities	iv
Table of Appendices	vi
Opinions Below	1
Statement of Jurisdiction	1
Constitutional, Statutory and Regulatory Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Petition	6
I. Petitioner Was Entitled To An Instruction That He Could Not Be Convicted Unless He Knowingly And Willfully Violated A Known Legal Duty As Defined In The Medicare Anti-Kickback Legislation As Limited By The Safe Harbor Provisions	6
II. Petitioner Should Not Have Been Subjected To A Trial In A District Where None Of The Elements Of The Crime Took Place	11

Contents

	Page
III. The District Court Erred When It Made A Determination That Defense Counsel Was Constitutionally Effective	12
Conclusion	13

TABLE OF CITED AUTHORITIES

Cases: *Page*

Burdine v. Johnson,
262 F.3d 336 (5th 2001) (en banc), *cert. denied*,
__ U.S. __, 122 S. Ct. 2347, 153 L. Ed. 2d 174
(2002) 13

Hanlester Network v. Shalala,
51 F.3d 1390 (9th Cir. 1995) 6, 7

Jain v. United States,
93 F.3d 436 (8th Cir. 1996) 6, 7

Ratzlaff v. United States,
510 U.S. 135, 114 S. Ct. 655, 126 L. Ed. 2d 615
(1994) i

United States v. Anderson,
328 U.S. 699, 66 S. Ct. 1213, 90 L. Ed. 1529
(1946) 11

United States v. Cabrales,
524 U.S. 1, 118 S. Ct. 1772, 141 L. Ed. 2d 1 (1998)
..... 11

United States v. Cronic,
466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657
(1984) 12

United States v. Smith,
198 F3d 377 (2d Cir. 1999) 11

Cited Authorities

Page

United States Constitution:

Art. III § 2, cl. 2 11

Fifth Amendment 2

Sixth Amendment 2, 11, 12

Statutes:

42 U.S.C. 1320a-7b(b)(1) 2, 6, 7

42 U.S.C. 1320a-7b(b)(2) 2, 6, 8

Rule:

Fed. R. Crim. P. 33 ..... 1, 5

Federal Regulations:

42 C.F.R. § 1001.952 ..... 2, 8

42 C.F.R. § 1001.952(f) 11

42 C.F.R. § 1001.952(i) 11

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Second Circuit Dated And Filed June 10, 2002 ..... 1a

Appendix B — Opinion And Order Of The United States District Court For The Southern District Of New York Dated And Filed October 27, 2000 .. 8a

Appendix C — Opinion Of The United States District Court For The District Of New York Dated And Filed July 7, 1999 ..... 25a

Appendix D — Constitutional Provisions Involved .. 50a

OPINIONS BELOW

On March 16, 1999, Mittal, then represented by Attorney Faith Gay, filed a motion to dismiss based on improper venue. The Government opposed. On July 7, 1999, the district court judge denied the motion. *United States v. Mittal*, 1999 WL 461293 (S.D.N.Y. 1999). [Appendix "C"]

On June 30, 2000, Mittal, represented by James E. Neumann, Esquire, filed a motion under Fed. R. Crim. P. 33. alleging the conviction should be vacated based on ineffective assistance of counsel. On October 27, 2000, the district court denied the Rule 33 motion. *United States v. Mittal*, 2000 WL 1610799 (S.D.N.Y. 2000). [Appendix "B"]

On June 10, 2002, the Second Circuit affirmed. *United States v. Mittal*, 36 Fed. Appx. 20, 2002 WL 1275105 (2d Cir. 2002). [Appendix "A"]

STATEMENT OF JURISDICTION

On August 30, 2002, this Honorable Court entered an order extending the deadline for filing the Petition for Certiorari until November 7, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). (Application No. 02-A169).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED[1]

Constitutional provisions

Fifth Amendment, United States Constitution

Sixth Amendment, United States Constitution

Statutory provisions

42 U.S.C. § 1320a-7b(b)(1)

42 U.S.C. § 1320a-7b(b)(2)

Regulatory provision

42 C.F.R. § 1001.952

STATEMENT OF THE CASE

On November 30, 1998, the Office of the United States attorney for the Southern District of New York filed Indictment No. 98CR1302 (JGK). Count One charged Brij Mittal, M.D.[2] with unlawfully, willfully and knowingly conspiring to violate 42 U.S.C. §§ 1320a-7(b)(1) and 1320a-7(b)(2). The Indictment reads, in pertinent part, as follows:

> BRIJ MITTAL, the defendant, unlawfully, willfully, and knowingly would and did solicit and receive remuneration, including kickbacks, bribes and rebates, directly and indirectly overtly and

---

1. The applicable text of the Fifth and Sixth Amendments, United States Constitution is set forth in the Appendix "D".

2. Brij Mittal is a Board Certified cardiologist.

covertly, in cash, in return for referring individuals to American Open for furnishing and arranging for the furnishing of items and services for which payment could be made in whole or in part under a Federal health care program, namely, the Medicare Program, and in return for arranging for and recommending purchasing, leasing and ordering goods, facilities, services and items for which payment could be made in whole or in part under a Federal health care program, namely, the Medicare Program in violation of Title 42 United States Code, Section 1320a-7b(b)(1).

* * *

Niranjan Patel, a/k/a "Ron Patel," and Joseph Goldstein, co-conspirators not named as defendants herein unlawfully, willfully, and knowingly would and did offer and pay remuneration, including kickbacks, bribes and rebates, directly and indirectly, overtly and covertly, in cash to a person, namely, BRIJ MITTAL, the defendant, to induce MITTAL to refer individuals to Ganesh and American Open for the furnishing and arranging for the furnishing of items and services for which payment could be made in whole or in part under a Federal health care program, namely, the Medicare Program, and to induce MITTAL to arrange for and recommend purchasing, leasing, and ordering goods, facilities, services and items for which payment could be made in whole and in part under a Federal Health care program, namely, the Medicare Program, in violation of Title 42, United States Code, Section 1320a-7b(b)(2)

The indictment alleged that the Medicare Program was partially financed by the United States Treasury; that Ganesh Surgical Supplies, Inc. ("Ganesh") was a supplier of durable medical equipment headquartered in Westchester County, New York; and that American Open MRI Center, Inc. ("American Open") was a medical facility that performed magnetic resonance imaging ("MRI") and radiology services and was located in Queens, New York.

The indictment alleged that Brij Mittal was a medical doctor licensed to practice in New York with offices in Brooklyn, New York.

Counts Two through Four of the Indictment read, in pertinent part, as follows:

> 14. On or about the dates set forth below, in the Southern District of New York and elsewhere, BRIJ MITTAL, the defendant, unlawfully, willfully, and knowingly, directly and indirectly, overtly and covertly, solicited and received remuneration, including kickbacks, bribes and rebates, in cash, in return for referring individuals to Ganesh and American Open for furnishing and arranging for the furnishing of items and services for which payment could be made in whole and in part under a Federal health care program, namely, the Medicare Program, and in return for arranging for and recommending purchasing, leasing and ordering of goods, facilities, services, and items for which payment could be made in whole or in part under a Federal health care program, namely, the Medicare Program, to wit, BRIJ MITTAL, the defendant solicited and

received cash kickbacks from Niranjan Patel, a/k/a "Ron Patel," in return for referring patients, several of whom were Medicare patients, to Ganesh and American as further set forth below:

Count	*Date*	*Amount of Payment*
TWO	9/5/97	$4,970.00
THREE	1/14/98	$9,300.00
FOUR	2/13/98	$4,140.00

(Title 42, United States Code, Section 1320a-b(b)(1))

On March 16, 1999, Mittal, then represented by Attorney Faith Gay, filed a motion to dismiss based on improper venue. The Government opposed. On July 7, 1999, the district court judge denied the motion. *United States v. Mittal*, 1999 WL 461293 (S.D.N.Y. 1999).

On March 27, 2000, trial commenced before the Honorable John G. Koeltl and a jury. On April 17, 2000, the jury convicted on all counts. At trial, Mittal was represented by Attorney Mark Marcus.

On June 30, 2000, Mittal, represented by James E. Neumann, Esquire, filed a motion under Fed. R. Crim. P. 33 alleging, inter alia, the conviction should be vacated based on the allegation that trial counsel slept through the trial. On October 27, 2000, the district court denied the Rule 33 motion. *United States v. Mittal*, 2000 WL 1610799 (S.D.N.Y. 2000).

On June 11, 2001, Mittal was sentenced to concurrent terms of thirty (30) months' imprisonment and three (3) years' supervised release on Counts One through Four. Mittal also was ordered to pay a $10,000 fine and a $400 special assessment.

On June 10, 2002, the Second Circuit affirmed. *United States v. Mittal*, 36 Fed. Appx. 20, 2002 WL 1275105 (2d Cir. 2002).

REASONS FOR GRANTING THE PETITION

I. Petitioner Was Entitled To An Instruction That He Could Not Be Convicted Unless He Knowingly And Willfully Violated A Known Legal Duty As Defined In The Medicare Anti-Kickback Legislation As Limited By The Safe Harbor Provisions

First, the writ should be granted to resolve an intercircuit conflict in connection with the meaning of "willfulness" as the term is used in connection with an alleged violation of the Medicare Anti-Kickback legislation. 42 U.S.C. §§ 1320a-7b(b)(1) and 1320a-7b(b)(2).

The *Hanlester Network, et al. v. Shalala*, 51 F.3d 1390, 1400 (9th Cir. 1995) held that the phrase "knowingly and willfully" as used in the Medicare Anti-Kickback Statute means: (1) knowledge of the existence of the statute; and (2) a specific intent to violate the statute.

Jain v. United States, 93 F.3d 436, 439 (8th Cir. 1996), the Court ruled that the Medicare Anti-Kickback legislation consists of the statute and the elaborate safe harbor provisions, which precipitated pages of administrative agency

explication. Because of the elaborate safe-harbors, the Medicare Anti-Kickback legislation includes conduct that is not "inevitably nefarious." That's why *Jain* held that the government must meet a heightened mens rea requirement in order to sustain a conviction under the Medicare Anti-Kickback legislation.

This case is somewhat more complicated than *Hanlester* or *Jain* because the referrals in this case may well be decriminalized by the safe harbor provisions.

Nevertheless, the district court judge instructed the jury as follows, "To find the defendant acted willfully, you must find that he knew what he was doing was illegal, although he need not have known the specific statute he may have been violating." *United States v. Mittal*, 2002 WL 1275105 **1.

The Second Circuit acknowledged the intercircuit conflict, but declined to reach the issue on the grounds that the any error in the district court's instruction was harmless error because the evidence showed the defendant had actual knowledge of the Medicare Anti-Kickback statute. As demonstrated below, this argument is simply unreasonable on the facts of this case.

42 U.S.C. § 1320a-7b(b)(1) prohibits

> the solicitation or receipt of any remuneration (including any kickback, bribe or rebate) directly or indirectly, overtly or covertly, in cash or in kind (A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or (B) in return for purchasing, leasing, ordering, or arranging for or recommending

> purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made under a Federal health care program.

42 U.S.C. § 1320a-7b(b)(2) prohibits

> the offer or payment of any remuneration (including any kickback, bribe or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person (A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or (B) to purchase, lease, order, for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made under a Federal health care program.

However, the scope of this extremely broad statute is limited by a series of "safe harbor" provisions. For example, 42 C.F.R. § 1001.952 reads, in pertinent part, as follows:

> (f) Referral services. As used in section 1128(B) of the Act, "remuneration" does not include any payment or exchange of anything of value between an individual or entity ("participant") and another entity serving as a referral service ("referral service") as long as all the following four standards are met —
>
> > (1) The referral service does not exclude as a participant in the referral service any individual or entity who meets the qualifications for participation.

(2) Any payment the participant makes to the referral service is assessed equally against and collected equally from all participants, and is only based on the cost of operating the referral service, and not on the volume or value of any referrals to or business otherwise generated by either party for the referral service for which payment may be made in whole or in part under Medicare, Medicaid, or other federal health care programs.

(3) The referral service imposes no requirements on the manner in which the participant provides services to a referred person, except that the referral service may require that the participant charge the person referred at the same rate as it charges other persons not referred by the referral service, or that these services be furnished free of charge or at reduced charge.

(4) The referral service makes the following five disclosures to each person seeking a referral, with each disclosure maintained by the referral service in a written record certifying such disclosure and signed by either such person seeking a referral or by the individual making the disclosure on behalf of the referral service —

(i) The manner in which it selects the group of participants in the referral service to which it could make a referral;

(ii) Whether the participant has paid a fee to the referral service;

(iii) The manner in which it selects a particular participant from this group for that person;

(iv) The nature of the relationship between the referral service and the group of participants to whom it could make the referral; and

(v) The nature of any restrictions that would exclude such an individual or entity from continuing as a participant.

* * *

(i) Employees. As used in section 1128B of the Act, "remuneration" does not include any amount paid by an employer to an employee, who has a bona fide employment relationship with the employer, for employment in the furnishing of any item or service for which payment may be made in whole or in part under Medicare, Medicaid, or other Federal health care programs . . .

* * * *

Because of the elaborate safe harbor provisions, this Court should make it clear that conviction under the Medicare Anti-Kickback legislation is not permissible unless the

defendant has a knowledge of the statute, a knowledge of the safe harbor provisions, and a specific intent to violate the statute as limited by the safe harbor provisions.

On the facts of this case, the Petitioner might well have been convicted of something that was perfectly legal: operating a referral service as defined in 42 C.F.R. § 1001.952(f) or paying his employees for assisting with referrals as defined in 42 C.F.R. § 1001.952(i).

The district court's instructions fail to make the jurors aware that referrals are not prohibited by the statute provided certain conditions are met. The district court's instructions fail to make the jury aware that the statute and the safe harbor provisions are to be read together, and that there can be no conviction absent specific intent to violate the statute as modified by the safe harbor provisions.

II. Petitioner Should Not Have Been Subjected To A Trial In A District Where None Of The Elements Of The Crime Took Place

Proper venue in a criminal prosecution is a constitutional right: "The Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed." Article III, Section 2, cl. 2. In addition, the Sixth Amendment provides a criminal defendant with the right to a trial "by an impartial jury of the State and district wherein the crime shall have been committed." In theory, the government bears the burden of proving venue by a preponderance of the evidence. When a defendant is charged with multiple counts, venue must be proper on each count. *United States v. Smith*, 198 F.3d 377, 382 (2d Cir. 1999).

Venue is limited to the place "where the criminal act is done." *United States v. Anderson*, 328 U.S. 699, 703, 66 S. Ct. 1213, 90 L. Ed. 1529 (1946); *United States v. Cabrales*, 524 U.S. 1, 7-8, 118 S. Ct. 1772, 141 L. Ed. 2d 1 (1998).

Defense counsel made timely motions to dismiss the indictment for lack of venue. The district court should have granted the motions because they were based on solid ground. Venue was not proper as to all counts of the Indictment. There was no allegation the referrals were illegal. There was no evidence the referrals were not medically necessary. There was no evidence of a Medicare rip-off. There was no evidence that Mittal received "remuneration" in the Southern District. Assuming there was a criminal act — which is a stretch given the safe harbor provisions — the criminal act was the solicitation or acceptance of remuneration which took place in the Eastern District of New York.

III. The District Court Erred When It Made A Determination That Defense Counsel Was Constitutionally Effective

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." The Sixth Amendment right to counsel "guarantees an accused 'adequate legal assistance.'" *United States v. Cronic*, 466 U.S. 648, 655, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 344, 100 S. Ct. 1708, 1715, 80 L. Ed. 2d 657 (1980)). "Unless the accused receives effective assistance of counsel, 'a serious risk of injustice infects the trial itself.'" *Id.* at 656, 104 S. Ct. 2039 (quoting *Cuyler v. Sullivan*, 446 U.S. at 343, 100 S. Ct. 1708).

Where the lawyer sleeps through substantial parts of the trial, the defendant is not required to show prejudice. *Burdine v. Johnson*, 262 F.3d 336 (5th 2001) (en banc) (upholding a Cronic claim in a case where the defendant's lawyer was asleep during parts of the trial because "unconscious counsel equates to no counsel at all. Unconscious counsel does not analyze, object, listen or in any way exercise judgment on behalf of the client."), *cert. denied*, __ U.S. __, 122 S. Ct. 2347, 153 L. Ed. 2d 174 (2002).

In this case, the district court rejected the Petitioner's argument that defense counsel slept through the trial without hearing what trial counsel had to say about the allegations. This, of course, was a manifest abuse of discretion. If, as anticipated, counsel had acknowledged sleeping through a substantial portion of the trial as a result of his very serious medical conditions, the Petitioner should have been awarded a new trial.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

CHERYL J. STURM
Attorney-At-Law
408 Ring Road
Chadds Ford, PA 19317
(484) 771-2000

Attorney for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED JUNE 10, 2002

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 01-1318

June 10, 2002

UNITED STATES of America,

Appellee,

v.

Brij MITTAL, M.D.,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York (John G. Koeltl, Judge)

Present STRAUB and SOTOMAYOR, Circuit Judges, SESSIONS, Judge.*

---

* The Honorable William K. Sessions, III, of the United States District Court for the District of Vermont, sitting by designation.

Appendix A

SUMMARY ORDER

AFTER ARGUMENT AND UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is hereby AFFIRMED.

Defendant-appellant Brij Mittal, M.D., appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York (John G. Koeltl, *Judge*), following a three-week jury trial.

On November 18, 1998, the Government filed a four-count indictment charging Mittal with one count of participation in a conspiracy in which he allegedly solicited and received illegal kickbacks for Medicare referrals, in violation of 42 U.S.C. §§ 1320a-7b(b)(1) and 1320a-7b(b)(2), and three counts of soliciting and receiving such kickbacks on three specific dates in 1997 and 1998. The evidence at trial showed that Mittal, a medical doctor with offices in Brooklyn, New York, had entered into a referral arrangement with Niranjan Patel, co-owner of Ganesh Surgical Supplies, Inc., a medical equipment supplier in Westchester County, and American Open MRI, a diagnostic laboratory in Queens County. Pursuant to this arrangement, which lasted from about 1990 to 1996, Mittal would refer patients to Patel's companies for Medicare-covered goods and services, and in exchange, Patel would make cash payments to Mittal. Mittal was convicted on all four counts on April 17, 2000. In a judgment filed on June 13, 2001, the District Court sentenced Mittal to, *inter alia,* thirty months' incarceration and three years' supervised release, and this timely appeal ensued.

Appendix A

Mittal contends that the District Court erred in refusing to instruct the jury, on each of the four counts, that in order to find him guilty of violating the Medicare anti-kickback statute, 42 U.S.C. § 1320a-7b(b), it had to find that he knew of and intended to violate that specific statute. Instead, the District Court told the jury that the Government was required to prove that Mittal "acted knowingly and willfully," which it defined as follows:

> A person acts 'knowingly' if he acts intentionally and voluntarily, and not because of ignorance, mistake, accident, or carelessness. Whether the defendant acted knowingly may be proven by the defendant's conduct and by all of the facts and circumstances surrounding the case. 'Willfully' means to act with knowledge that one's conduct is unlawful and with the intent to do something that the law forbids, that is to say with the bad purpose to disobey or to disregard the law. To find that the defendant acted willfully, you must find that he knew what he was doing was illegal, although he need not have known the specific statute he may have been violating. The defendant's conduct was not willful if it was due to negligence, inadvertence, or mistake.

We have not yet decided whether, in a prosecution for a violation of the Medicare anti-kickback statute, the Government is required to prove that the defendant knew of and intended to violate that specific statute. We recognize the lack of unanimity among the other Circuits that have addressed this particular question. *Compare United States v.*

Starks, 157 F.3d 833, 837-39 (11th Cir.1998) (knowledge of statute not required); *United States v. Davis,* 132 F.3d 1092, 1094 (5th Cir.1998) (same); *United States v. Jain,* 93 F.3d 436, 439-41 (8th Cir.1996) (same), *cert. denied,* 520 U.S. 1273, 117 S.Ct. 2452, 138 L.Ed.2d 210 (1997), *with Hanlester Network v. Shalala,* 51 F.3d 1390, 1399-1400 (9th Cir.1995) (knowledge of statute required).

However, we decline to reach the issue, for we find that any error in the District Court's instruction was harmless. The evidence clearly established Mittal's actual knowledge of the Medicare anti-kickback statute. Dr. Pritpal Kang testified that in 1993, he, Mittal, and another colleague sought legal advice from the law firm of Proskauer, Rose, Goetz and Mendelsohn regarding a diagnostic center that they jointly owned. The three men met with a lawyer at the offices of Proskauer Rose for about two hours, and after the meeting, the lawyer sent a letter to Mittal and his colleagues summarizing the matters discussed at the meeting and his advice on those matters. The letter, eight pages of single-spaced text, identified and discussed in detail the Medicare anti-kickback statute, stating in part:

> The anti-kickback law prohibits any form of "remuneration" "in return for referring an individual to a physician for the furnishing or arranging for the furnishing of any item or service for which payment may be made" by the Medicare or Medicaid programs. Violators are subject to civil and criminal sanctions.

The letter went on to describe various "safe harbors" available under the statute. Dr. Kang testified that the letter

accurately reflected what was discussed at the meeting, and that he subsequently spoke with Mittal about the matters covered in the letter. This evidence of Mittal's knowledge of what was unlawful under the anti-kickback statute was not challenged or controverted by the defense. Furthermore, as described above, the District Court instructed the jury that in order to find Mittal guilty, they had to find that he knew that his conduct was unlawful. This instruction ensured that the jury would not convict Mittal for conduct that he considered innocent. We therefore conclude that any deficiency in the District Court's instruction on Mittal's *mens rea* was harmless.

Mittal also challenges the venue of his prosecution, asserting that the allegedly criminal conduct took place at his offices in Brooklyn, which is not within the Southern District of New York. We apply a "substantial contacts" test in determining whether the Government has met its burden of proving that venue is proper, "tak[ing] into account a number of factors—the site of the defendant's acts, the elements and nature of the crime, the locus of the effect of the criminal conduct, and the suitability of each district for accurate factfinding." *United States v. Reed,* 773 F.2d 477, 481 (2d Cir.1985); *see also United States v. Saavedra,* 223 F.3d 85, 93 (2d Cir.2000) (applying *Reed*), *cert. denied sub nom. Rodriguez v. United States,* 532 U.S. 976, 121 S.Ct. 1612, 149 L.Ed.2d 476 (2001). We also recognize that "any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed." 18 U.S.C. § 3237.

The evidence supports a finding that venue was proper. Under the kickback arrangement described at trial, Mittal would refer patients to Patel and, in return, Patel would send a payment to Mittal. Mittal's referral functioned as the "solicitation" of a particular payment, which was then received by Mittal at his offices. Patel testified that either Mittal or a member of his staff would call Patel's offices in Westchester County—which is part of the Southern District of New York—to refer a patient. Patel then would send the requisite Medicare and/or prescription forms from his office in Westchester to Mittal's office in Brooklyn. Mittal would sign the forms and send them back to Patel's Westchester offices. As to the three undercover payments that were the subject of Counts Two, Three, and Four of the indictment, Patel gave Mittal tally sheets listing the referrals to which the payments corresponded. The referrals underlying each of the three payments were part of the criminal conduct: each was a solicitation of the payment that Patel eventually made. *See* 42 U.S.C. § 1320a-7b(b)(1) (barring "solicit[ing] or receiv[ing] any remuneration" in return for Medicare referrals). Because those solicitations "reached into" the Southern District of New York by telephone and mail, venue was proper. *Cf. United States v. Stephenson*, 895 F.2d 867, 874-75 (2d Cir.1990) (in bribery case, venue was proper in the Southern District of New York where defendant, while in Washington, D.C., called individuals in New York seeking bribes).

Lastly, Mittal claims that he received ineffective assistance of counsel at trial. This argument was rejected by the District Court in its ruling on Mittal's motion for a new trial pursuant to Rule 33 of the Federal Rules of Civil

Procedure, and we affirm substantially for the reasons stated in the District Court's thorough and well-reasoned opinion. *See United States v. Mittal*, 98 Cr. 1302, 2000 WL 1610799 (S.D.N.Y. Oct. 27, 2000).

For the reasons stated, we AFFIRM the judgment of the District Court.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AND FILED OCTOBER 27, 2000

UNITED STATES DISTRICT COURT,
S.D. NEW YORK

No. 98 CR. 1302(JGK)

UNITED STATES OF AMERICA,

v.

Brij MITTAL,

Defendant.

Oct. 27, 2000

OPINION AND ORDER

KOELTL, J.

On April 17, 2000, a jury returned a verdict of guilty against the defendant Dr. Brij Mittal on all four counts of an indictment charging criminal offenses in connection with the Medicare program. Count one charged conspiracy to violate the provisions of 42 U.S.C. § 1320a-7b(b)(1) & (2) in violation of 18 U.S.C. § 371 and counts two through four charged substantive violations of 42 U.S.C. § 1320a-7b(b)(1). The defendant now moves, pursuant to Federal Rule of Criminal Procedure 33, for a new trial based on his allegation that he received ineffective assistance of counsel at trial.

Appendix B

I.

The Court previously detailed the allegations in the Government's indictment in its decision denying the defendant's motion to dismiss, familiarity with which is assumed. *See United States v. Mittal,* 98 Cr. 1302, 1999 WL 461293 (S.D.N.Y. July 7, 1999). The allegations are repeated here to the extent relevant for this decision. The indictment charged that from in or about October 1990 through 1997, the defendant, a medical doctor licensed by the State of New York and others known and unknown to the Grand Jury knowingly conspired to violate 42 U.S.C. § 1320a-7b(b)(1) and (2). As an object of the alleged conspiracy, the defendant solicited and received renumeration, including kickbacks, bribes, and rebates, in return for referring individuals to Ganesh Surgical Supplies ("Ganesh") and American Open MRI Center Inc. ("American Open") for furnishing and arranging for the furnishing of items and services for which payment would be made in whole or in part under the Medicare Program, and in return for arranging for and recommending purchasing, leasing and ordering of goods, facilities, services, and items for which payment could be made under Medicare. (Ind.¶ 9.) Ganesh, an approved Medicare provider, was owned and operated by Niranjan Patel and Joseph Goldstein and was a supplier of durable medical equipment. (Ind.¶ 5.) American Open, also an approved Medicare provider, was also owned and operated by Niranjan Patel and Joseph Goldstein and performed magnetic resonance imaging. (Ind.¶ 6.) The indictment detailed the means and methods of the conspiracy as well as a number of alleged overt acts committed in furtherance of the conspiracy. (Ind.¶¶ 11-12.)

Appendix B

The indictment also charged that the defendant solicited and received renumeration, including kickbacks, bribes, and rebates, in return for referring individuals to Ganesh and American Open for furnishing and arranging for the furnishing of items and services for which payment could be made in whole or in part under Medicare, and in return for arranging for and recommending purchasing, leasing, and ordering of goods, facilities, services, and items for which payment could be made in whole or in part under Medicare. In particular, the defendant is alleged to have solicited and received cash kickbacks from Niranjan Patel in return for referring patients, several of whom were Medicare patients, to Ganesh and American Open on September 5, 1997 in the amount of $4,970 (Count 2), on January 14, 1998 in the amount of $9,300 (Count 3), and on February 13, 1998 in the amount of $4,140 (Count 4).

At trial, the Government presented powerful evidence that the defendant regularly received kickbacks over a period spanning more than seven years in exchange for referring his Medicare patients to Ganesh for durable medical equipment and to American Open for various diagnostic tests, including MRIs and CAT scans. The three payments to the defendant on September 5, 1997, January 14, 1998, and February 13, 1998 were made by Niranjan Patel after he had begun to cooperate with the Government and were carefully documented. Audio tapes and transcripts of the meetings during which the payments were made were introduced at trial. The Government presented the testimony of Niranjan Patel, who, as one of the owners of Ganesh and American Open, personally paid kickbacks to the defendant for over seven years. The Government also presented the testimony

of Nilay Patel, Niranjan Patel's nephew, who personally delivered cash kickbacks to the defendant on a number of occasions on behalf of his uncle.

In addition, the Government introduced the three undercover tapes of conversations between the defendant and Niranjan Patel, made by Niranjan Patel under the supervision of the Federal Bureau of Investigation ("FBI"). The defendant's own words on these tapes provided substantial evidence of the kickback scheme. Niranjan Patel's testimony, which directly and unambiguously incriminated the defendant, was corroborated by extensive documentary evidence including Ganesh and American Open documents reflecting all referrals from the defendant with some handwritten notations indicating when cash kickbacks were delivered to the defendant and records reflecting the three undercover payments to the defendant and the patients for whose referral the cash payments were being made. The Government also presented the testimony of a supervising FBI agent as to how the undercover tapes were created and the circumstances surrounding the undercover payments and the testimony of the expert translator who was responsible for preparing the transcripts of the tapes including the translation of Hindi portions into English.[1]

---

1. Niranjan Patel also video taped the final two meetings during which he testified he made payments to the defendant. Those video tapes, which were made with a hidden camera, were inconclusive because of technical problems and difficulties in the focus of the camera.

Appendix B

II.

A court may grant a new trial "if the interests of justice so require." Fed.R.Crim.P. 33; *accord United States v. Sanchez,* 969 F.2d 1409, 1413 (2d Cir.1992); *United States v. Adams,* No. Cr. 51, 1998 WL 516115 at *2 (S.D.N.Y. Aug. 20, 1998), *aff'd,* 216 F.3d 1073 (2d Cir.2000).

To establish a claim of ineffective assistance of counsel, the defendant must show both that: (1) his counsel's performance was deficient in that it was objectively unreasonable under professional standards prevailing at the time, and (2) that his counsel's deficient performance was prejudicial to his case. *See Strickland v. Washington,* 466 U.S. 668, 687 (1984); *Bunkley v. Meachum,* 68 F.3d 1518, 1521 (2d Cir.1995).

The defendant cannot meet the first prong of this test merely by showing that his counsel employed poor strategy or made a wrong decision. Instead, the defendant must establish that his counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *See Strickland,* 466 U.S. at 687. In fact, there is a "strong presumption" that defense counsel's conduct fell within the broad spectrum of reasonable professional assistance, and a defendant bears the burden of proving "that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." *Kimmelman v. Morrison,* 477 U.S. 365, 381 (1986) (*citing Strickland* at 688-89).

To meet the second prong of the *Strickland* test, the defendant must show that "[t]here is a reasonable probability

that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694; *see also Ramos v. United States,* No. 97 Civ. 2572, 1998 WL 230935, at *2-*3 (S.D.N.Y. May 8, 1998).

(A)

The defendant first claims that his trial counsel promised in opening argument to produce the testimony of a translator and independent transcripts of government tape recordings but that he failed to do so. The record shows that parts of the tapes were in Hindi and trial counsel stated in his opening that he had seen an independent translator's transcript of the tapes that was substantially different from the government's transcript. (Tr. at 56.) Trial counsel ultimately was unable to introduce those independent transcripts into evidence (Tr. at 1277), and the testimony of the defendant's translator was limited to explaining the difficulties in translating the audio tapes. The defendant alleges that these failures were due to trial counsel's inadequate preparation for trial. The defendant also maintains that if trial counsel had reviewed the transcripts carefully, he would not have made such a bold claim in his opening because the proposed defense transcripts were incomprehensible and did not undermine the government's case.

However, trial counsel never promised that he would introduce the defense transcripts at trial. In his opening statement, while trial counsel alluded to the existence of a different translation of the government's tapes, he never

promised to produce the actual transcripts. (Tr. at 56.) The primary claim in the opening statement was not that trial counsel would introduce independent transcripts, but that the government's transcripts were unreliable. Trial counsel stated that the tapes never explicitly recorded an exchange of money (Tr. at 59-60), critiqued the audibility of the tapes (Tr. at 59), noted the presence of gaps in the tape (Tr. at 56), and argued that the government's translator could not be trusted (Tr. at 56), but he never said he would introduce physical transcripts in court. Trial counsel did refer briefly to calling his own interpreter. (Tr. at 58.) ("And when the interpreter comes in it is up to you to decide which one of the interpreters is giving you the accurate interpretation."). However, trial counsel also noted that he had not stated what witnesses he would produce (Tr. at 59), and that he was not telling the jury what he was prepared to prove at trial. (Tr. at 62) ("And I am not going to tell you what I am prepared to prove because I don't want them to know."). Furthermore, at a sidebar conference during the first week of testimony, trial counsel noted that he would "never promise" to bring in his own translator. (Tr. at 357.) Later, trial counsel informed the Court that he would not try to introduce the transcripts unless there was a foundation for them. (Tr. at 1194.)

When the defense called its expert translator, the expert translator was not able to lay a proper foundation for the introduction of the defense transcripts. (Tr. at 1277.) The transcripts did not indicate which portions of the tapes had been in English and which were in Hindi, and indicated that large portions were inaudible. The translator testified that the only way to prepare a transcript was to play the tape again and again (Tr. at 1267), and he could not establish the

admissibility of the tapes the defense sought to introduce. (Tr. 1247-48, 1272-77.) The testimony of the defense translator was marginally helpful to the defense because the witness was qualified as an expert translator (Tr. at 1264), and emphasized the difficulty of preparing accurate transcripts of the tapes. (Tr. 1248-50, 1265-67.) But the testimony was not helpful to the defense to the extent that it possibly raised the jury's expectations that there would be a competing set of transcripts which did not materialize.

However, defense counsel's conduct with respect to his effort to introduce competing expert testimony cannot be said to rise to the level of objectively unreasonable conduct. The fact that trial counsel did not follow the exact letter of his opening statement does not mean that his representation fell below reasonable professional standards. Changing course from the roadmap outlined in opening statement as the trial progresses is not necessarily ineffective assistance. *See, e.g., United States v. McGill,* 11 F.3d 223, 227-28 (1st Cir.1993) (holding that failure to deliver on opening promise to put on expert witness was not ineffective assistance); *Schlager v. Washington,* 887 F.Supp. 1019, 1026-27 (D.Ill.1995), *aff'd* 113 F.3d 763 (7th Cir.1997) (holding that strategic decision not to introduce witnesses promised in opening statement was not ineffective assistance). In this case, trial counsel decided not to offer the transcripts into evidence because he realized that he could not overcome the evidentiary objections made by the government. (Tr. at 1194, 1277.) He did not withdraw crucial evidence without reason as in *Harris v. Reed,* 894 F.2d 871 (7th Cir.1990) where counsel failed to fulfill a promise to call eyewitnesses who saw a man other than the defendant run from the scene of

the crime, or *Anderson v. Butler,* 858 F.2d 16 (1st Cir.1988) where counsel promised but failed to call an expert witness to support a theory that defendant was a "a robot" with no appreciation of his actions.

Most importantly, the defendant cannot establish prejudice from his trial counsel's failure to introduce the transcripts at trial. The defendant has not proffered any set of allegedly admissible transcripts that could have been admitted and that would have supported the defendant's contentions at trial. Indeed the defense argues on this motion that the defense transcripts are so incomprehensible that trial counsel erred in referring to them in his opening. The defendant was not prejudiced by his trial counsel's inability to introduce transcripts that the defendant's current counsel does not even contend were admissible. The fact that trial counsel was left to rely on his cross examination of the Government's expert without introducing alternative transcripts did not prejudice the defendant. *See, e.g., United States v. Nguyen,* 997 F.Supp. 1281, 1291 (D.Cal.1998); *United States v. Atherton,* 846 F.Supp. 170, 173-74 (D.Conn.1994).

Moreover, trial counsel's effort to admit the transcripts was not prejudicial to the defendant because it did not detract from any of the defendant's arguments that the tapes were unreliable, that the Government translator was untrustworthy, and that the Government transcripts were the result of extensive collaboration between the Government translator and the prosecutor. Similarly, trial counsel's examination of the defense expert did not prejudice the defendant. This effort marginally supported the defendant's argument that the tapes

were difficult to understand and translate and these efforts did not detract from the major thrust of the defendant's claim that the Government transcripts were unreliable.[2]

The defendant's additional argument that the transcripts would have been useable if counsel had prepared them with the defendant is also speculation without foundation. The defendant has not offered any purportedly admissible transcripts, prepared with the defendant's assistance. Moreover, a purpose for hiring an independent translator was to produce an allegedly objective transcript. If the defendant influenced the translation process, he would no longer have been able to argue, as his trial counsel repeatedly did, that the government's transcripts were not objective and were unreliable.

The trial counsel's failure to introduce the transcripts at trial was not an instance of ineffective assistance of counsel and the defendant was not prejudiced by his trial counsel's efforts in connection with those transcripts or the limited testimony of the defense expert.

(B)

The defendant presents a list of his counsel's alleged deficiencies. These include trial counsel's confusion about

---

2. The defendant's speculation on this motion that his trial counsel did not review the defense transcripts of the tapes prior to trial is not supported by the record. The transcripts were produced to the government the Wednesday before trial. (Tr. at 362.) Trial counsel referred to the transcripts and their difference from the Government transcripts in his opening. (Tr. at 56.)

certain documents, failure to review certain exhibits and tapes, delegation of witness interviews to an investigator, failure to understand basic legal principles, poor cross examination skills, and inflammatory comments during summation. The defendant's argument is fatally flawed from the start because he concedes that he cannot demonstrate that any of these omissions would have made a difference in the trial. (Tr. of Sept. 22, 2000 at 21.)

Furthermore, many of these assertions are unsupported speculation. This was a complex trial with numerous exhibits and documents. Confusion about the location or content of some of these materials was understandable. Indeed while the defendant now points to confusion over the various versions of the tapes from originals to redacted versions, trial counsel's efforts to emphasize the different versions of the tapes was consistent with the reasonable defense strategy of casting doubt on the reliability of the tapes. Trial counsel's knowledge of the materials and legal and evidentiary rules was not so deficient as to support a claim that he was unprepared for trial or was not competent to try the case. Indeed, defense counsel conducted a thorough and extensive examination of the main government witnesses—Niranjan Patel, Nilay Patel, the government agent, and the government translator.

The defendant alleges that his trial counsel's delegation of witness preparation to an investigator was ineffective assistance of counsel. The investigator interviewed numerous witnesses and taped those interviews and trial counsel only presented a small number of these witnesses at trial. But those witnesses or potential witnesses were generally former

patients of the defendants whose testimony was only marginally relevant to the case. While they could testify that they needed medical services and found the services provided to be satisfactory, they had no way of knowing whether the defendant had received any payments for referring them for the services they received. The testimony of the witnesses called was brief and did not require extensive preparation. The defendant's trial strategy was to emphasize that the testimony of his witnesses was unscripted because he had not met with them before, as contrasted to the testimony of the government witnesses who had allegedly been coached. (Tr. at 1783.) It cannot be said that this was unreasonable trial strategy, particularly given the relatively unimportant testimony from the defense witnesses. Trial counsel's delegation of witness interviews to an investigator was not the sort of complete failure to investigate critical issues that is objectively unreasonable.[3]

Most importantly, the defendant has not shown that he was prejudiced at all by trial counsel's preparation for witness examinations or his efforts to find additional witnesses. He has failed to show that there were additional witnesses who should have been called or any additional testimony that

3. The defendant's general allegation of inadequate preparation is insufficient to establish that he received ineffective assistance of counsel. This case is unlike the cases on which the defendant now relies where trial counsel failed to interview critical witnesses. *See, e.g., United States v. Kauffman,* 109 F.3d 186 (3d Cir.1997) (failing to interview known alibi witnesses); *Bryant v. Scott,* 28 F.3d 1411 (5th Cir.1994) (failing to procure alibi witnesses whom counsel knew to have important information about the case); *Tosh v. Lockhart,* 879 F.2d 412 (8th Cir.1989) (making no effort to locate any witnesses).

should have been elicited. *See, e.g., Polanco v. United States,* No. 99 Civ. 5739, 2000 WL 1072303, at *10 (S.D.N.Y. Aug. 3, 2000) (collecting cases); *Waters v. Hoke,* No. 85 Civ. 2655, 1986 WL 14616, at *2 (E.D.N.Y. Nov. 18, 1986). Indeed, the defendant conceded at the argument of this motion that he could not say that the result at trial would have been any different had trial counsel rather than an investigator interviewed the witnesses. (Tr. of Sept. 22, 2000 at 19-20.)

The defendant now contends that his trial counsel's cross examination "was so repetitive and misguided as to render it largely useless." (Def. Memo at 21.) That is simply not an accurate description of the trial record. While the cross examination was lengthy and objections were sustained, and while the Court understandably attempted to accelerate the pace of the cross examination at side-bar conferences, the cross examination appeared to the Court to be extremely thorough and skillfully conducted. The cross examinations developed numerous themes which the defendant emphasized, including the extent of Niranjan Patel's interest in cooperation with the Government, the extent of the Government's witness preparation, the lack of clearer audio and videotapes, and the extent to which the Government translator had labored to produce the transcripts. While the cross examination was aggressive, the conduct of cross examination is generally entrusted to the judgment of trial counsel. *See United States v. Luciano,* 158 F.3d 655, 659 (2d Cir.1998). Significantly, defense counsel does not explain in the current motion what additional lines of cross examination should have been pursued or what additional evidence could have been produced to alter the result of the trial.

Appendix B

The defendant's current allegations that trial counsel made inflammatory statements in his summation are also inaccurate. He first claims that trial counsel stereotyped people living in the Bronx as drug dealers. In fact, rather than insulting people who live in the Bronx, this statement alleged that the Government's main witness preyed on those individuals. (Tr. at 1776.) He then claims that trial counsel made certain ethnically or religiously offensive remarks. Some of these remarks were apparently intended to evoke sympathy for the defendant because of his ethnicity and, while improper, they were part of a trial strategy that cannot be found to have prejudiced the defendant in any way. Indeed, the Court instructed the jury that bias or prejudice was not to enter the jury deliberations in any way.

Most importantly, the defendant fails to show how he was prejudiced by any of the alleged trial errors. At argument of the present motion, the defendant did not seek to link any particular alleged failure by the defense to a different result at trial but asked the Court to find that "as a whole trial counsel was not doing his job." (Tr. of Sept. 22, 2000 at 21.) But, having assessed the entire trial record, it is clear that none of the alleged failures of trial counsel either individually or taken together were such that there is "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694. Indeed, it is quite clear to the Court that the alleged errors in this case had no effect on the outcome of the trial.

The Government's evidence was overwhelming. Niranjan Patel testified that he paid kickbacks to the

defendant, detailed those kickbacks, and supported his testimony with documents and audio tapes evidencing the payments that were the subject of the three substantive counts. (Tr. 531-635, 798-930.) Nilay Patel testified that he delivered cash to the defendant. (Tr. 1473-88.) Trial counsel vigorously cross examined the government witnesses, but the jury's verdict was a determination that the testimony of the government witnesses, supported by documents and tapes, was credible. There is nothing in the errors alleged by trial counsel now that would have dented the government's evidence at trial or produced any different result. *See, e.g., Strouse v. Leonardo,* 928 F.2d 548, 556 (2d Cir.1991); *United States v. Simmons,* 923 F.2d 934, 956 (2d Cir.1991); *United States v. Reiter,* 897 F.2d 639, 645 (2d Cir.1990); *Wise v. Smith,* 735 F.2d 735, 739 (2d Cir.1984).[4]

(C)

Finally, the defendant's claim that his trial counsel slept at trial is unsupported by the record and is not a basis for any relief. At the start of trial, trial counsel informed the Court that at times he closed his eyes because of a medical condition but was paying attention and not sleeping. (Tr. 115-16.) On March 31, 2000 the Court noticed that trial counsel had been closing his eyes and asked trial counsel prior to the lunch recess if he had been paying attention. (Tr. 630.) Both trial counsel and his co-counsel assured the Court that

---

4. The Court has carefully considered all of the alleged trial errors alleged by the defense. To the extent not specifically discussed, the Court has found them not to support a claim of ineffective assistance of counsel either singly or cumulatively. *See Wise,* 735 F.2d at 739.

trial counsel had been awake. (*Id.*) A similar sequence of events occurred only once more on April 13, 2000 with the same result. (Tr. at 1733.)

The two instances where trial counsel closed his eyes during the course of the trial are not a basis for a new trial. *See, e.g., United States v. Muyet,* 994 F.Supp. 550, 560 (S.D.N.Y.1998) (concluding that counsel who fell asleep a few times during trial was not ineffective); *see also United States v. Ditommaso,* 817 F.2d 201, 215-16 (2d Cir.1987) (holding that record did not support allegation that counsel was sleeping). This case is not one like *Tippins v. Walker,* 77 F.3d 682, 689 (2d Cir.1996) where counsel was repeatedly unconscious during times when the defendant's interests were at stake. In this case trial counsel vigorously participated throughout the trial and was assisted by co-counsel. It was apparent that trial counsel objected in the course of the government examination of witnesses and vigorously cross examined the government witnesses. In the only two instances where it appeared that trial counsel closed his eyes both trial counsel and his co-counsel assured the Court that trial counsel was not sleeping.[5] Trial counsel's participation did not fall below prevailing professional norms and was not unprofessional error.

---

5. While trial counsel has submitted an unsworn letter supporting the motion, he does not suggest that any of his representations to the Court were false. *See* Aug. 3, 2000 letter of Mark Marcus.

Appendix B

CONCLUSION

For the reasons explained above, the defendant's motion under Rule 33 of the Federal Rules of Criminal Procedure for a new trial is denied. SO ORDERED.

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW YORK DATED AND FILED JULY 7, 1999

UNITED STATES DISTRICT COURT,
S.D. NEW YORK.

No. 98 CR. 1302(JGK).

UNITED STATES of America,

v.

Brij MITTAL,

Defendant.

July 7, 1999

OPINION

KOELTL, District J.

The defendant is charged in a four-count indictment with one count of conspiracy to violate the provisions of 42 U.S.C. § 1320a-7b(b)(1) & (2) in violation of 18 U.S.C. § 371 and three substantive counts of violating 42 U.S.C. § 1320a-7b(b)(1). The defendant now moves before trial 1) to dismiss the indictment for improper venue, 2) to dismiss the indictment because the indictment does not state a criminal offense under the relevant statutes, 3) for a bill of particulars, 4) to exclude allegedly irrelevant, inadmissible and prejudicial material, and 5) to have the Government produce evidence that is exculpatory or material to the defense.

Appendix C

I.

The indictment alleges that the Medicare Program pays for certain medical benefits, including certain durable medical equipment supplies, for eligible individuals. (Indictment ¶ 1 (hereinafter "Ind.").) Medicare is administered by the Health Care Financing Administration of the United States Department of Health and Human Services and Medicare benefits are paid in part out of a trust fund financed by appropriations from the United States Treasury. (Ind.¶ 2.)

At all times relevant to the indictment, the defendant, a medical doctor licensed by the State of New York, was an approved Medicare provider with offices in Brooklyn, New York. (Ind.¶ 4.) Ganesh Surgical Supplies ("Ganesh"), owned and operated by Niranjan Patel ("Patel") and Joseph Goldstein ("Goldstein") and located in Westchester County, New York, was a supplier of durable medical equipment and an approved Medicare provider. (Ind.¶ 5.) From in or about 1996 through in or about 1997, Patel and Goldstein also owned and operated American Open MRI Center Inc. ("American Open"), a medical facility that performed magnetic resonance imaging ("MRI") and other services in Queens, New York. American Open was an approved Medicare provider. (Ind.¶ 6.) Patel and Goldstein also owned and operated Park Plaza Chemists, Inc. ("Park Plaza"), a pharmacy located in the Bronx, New York. (Ind.¶ 7.) The indictment alleges that Patel and Goldstein are co-conspirators of the defendant although they are not named as defendants in the indictment. (Ind.¶ 5.)

Appendix C

The indictment charges that from in or about October 1990 up to and including in or about 1997, the defendant and others known and unknown to the Grand Jury unlawfully, willfully, and knowingly did combine, conspire and confederate and agree together and with each other to violate 42 U.S.C. § 1320a-7b(b)(1) and (2). As an object of the alleged conspiracy, the defendant solicited and received remuneration, including kickbacks, bribes and rebates, directly and indirectly, overtly and covertly, in cash, in return for referring individuals to Ganesh and American Open for furnishing and arranging for the furnishing of items and services for which payment would be made in whole or in part under a Federal health care program, namely Medicare, and in return for arranging for and recommending purchasing, leasing and ordering of goods, facilities, services, and items for which payment could be made under Medicare. (Ind.¶ 9.) As part of that conspiracy, the indictment charges that Patel and Goldstein offered and paid remuneration, including kickbacks, bribes and rebates, to the defendant to induce him to refer patients to Ganesh and American Open for the furnishing of items and services for which payment could be made under Medicare. (Ind.¶ 10.) The indictment then details the means and methods of the conspiracy as well as a number of alleged overt acts committed in furtherance of the conspiracy. (Ind.¶¶ 11-12.)

The indictment also charges that the defendant solicited and received remuneration, including kickbacks, bribes and rebates, in cash, in return for referring individuals to Ganesh and American Open for furnishing and arranging for the furnishing of items and services for which payment could be made in whole or in part under a Federal health care program,

namely Medicare, and in return for arranging for and recommending purchasing, leasing, and ordering of goods, facilities, services, and items for which payment could be made in whole or in part under a Federal health care program, namely Medicare. In particular, the defendant is alleged to have solicited and received cash kickbacks from Patel in return for referring patients, several of whom were Medicare patients, to Ganesh and American Open on September 5, 1997 in the amount of $4,970 (Count 2), on January 14, 1998 in the amount of $9,300 (Count 3), and on February 13, 1998 in the amount of $4,140 (Count 4).

II.

The defendant first contends that venue in the Southern District of New York is improper as to each count of the indictment. With respect to the conspiracy count, the defendant argues that venue in the Southern District of New York is improper because the only acts committed in furtherance of the alleged conspiracy in the Southern District were done by the defendant's co-conspirators and those acts were not foreseeable to the defendant. Further, the defendant argues that counts two through four were not committed in the Southern District of New York for purposes of venue. He contends that under the substantive statute, these alleged offenses were committed only at his office in Brooklyn, in the Eastern District of New York, the location where Patel allegedly delivered the money to him.

The Government responds that venue in the Southern District of New York is proper. The Government argues that there is venue over the conspiracy count because overt acts

were committed in furtherance of the conspiracy by the defendant's co-conspirators in the Southern District of New York. Further, venue over counts two through four is proper because as part of those alleged crimes, the defendant referred patients to facilities in the Southern District of New York, the defendant made or caused to be made calls into the Southern District to make those referrals, and documents necessary for those Medicare payments were sent by Ganesh from the Southern District to the defendant in the Eastern District and then by the defendant back to the Southern District.

The United States Constitution provides that an accused "shall enjoy the right to a speedy and public trial . . . [in] the State and district wherein the crime shall have been committed . . . ." U .S. Const. amend. VI; *see also* U.S. Const. Art. III, § 2, cl. 3 ("The Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed . . . .") Thus proper venue must be demonstrated in a criminal case, and "[t]he Government bears the burden of proving, by a preponderance of the evidence, that venue exists." *United States v. Naranjo,* 14 F.3d 145, 146 (2d Cir.), *cert. denied,* 511 U.S. 1095 (1994). "Venue is proper in any district in which the crime is committed." *Naranjo,* 14 F.3d at 147 (citing Fed.R.Crim.P. 18; 18 U.S.C. § 3237(a)). Offenses committed in more than one district may be prosecuted in any district where the crime was "begun, continued, or completed." 18 U.S.C. § 3237(a). Where there is more than one count charged in an indictment, venue must be proven with respect to each count. *See United States v. Beech-Nut Nutrition Corp.,* 871 F.2d 1181, 1188 (2d Cir.), *cert. denied sub nom. Lavery v. United States,* 493 U.S. 933 (1989).

Appendix C

With respect to proper venue over a charge of conspiracy, it is well established that "venue is proper in any district in which an overt act in furtherance of the conspiracy was committed by any of the coconspirators. . . . The defendant need not have been present in the district, so long as an overt act in furtherance of the conspiracy occurred there." *Naranjo,* 14 F.3d at 147; *see also United States v. Tannenbaum,* 934 F.2d 8, 12 (2d Cir.1991). In this case, the Government has pointed to a number of overt acts in furtherance of the conspiracy that were committed in the Southern District. For example, the indictment alleges that from in or about 1990 through in or about 1997, Patel and Goldstein appropriated cash from Lotto ticket sales made at Park Plaza in the Southern District and used that cash to make kickbacks to the defendant. (Ind.¶ 12(a).) It also alleges that on a number of occasions the defendant received cash kickbacks from Patel in exchange for referring patients to Ganesh, a company located in the Southern District of New York. (Ind.¶ 12(b- n).)

The parties dispute whether the fact that the defendant's co-conspirators took money from Lotto sales at the Park Plaza to pay the kickbacks is sufficient to establish venue over count one. In any event, the Government contends that it will prove at trial that the defendant made calls to and received calls from the Southern District of New York in furtherance of the conspiracy. Indeed, the Government alleges that these telephone calls to the Southern District of New York furthered the referral of the patients in return for the money the defendant allegedly received. The calls furthered the conspiracy. Moreover, the conspirators allegedly caused various forms to be sent to and returned from the Southern

District of New York to further the referrals. Such calls and mailings are overt acts sufficient to establish venue over the conspiracy count. *See, e.g., Naranjo,* 14 F.3d at 147; *United States v. Rios-Gonzalez,* 98 Cr. 688, 1998 WL 799178, at *1 (S.D.N.Y. Nov. 16, 1998). As defense counsel conceded at oral argument, the fact that these alleged telephone calls and mailings to and from the Southern District of New York are not specified in the indictment does not defeat venue based on such calls. *Cf. United States v. Frank,* 156 F.3d 332, 337 (2d Cir.1998) (noting the "well-established rule of this and other circuits that the overt act element of a conspiracy charge may be satisfied by an overt act that is not specified in the indictment, at least so long [as] there is no prejudice to the defendant"), *cert. denied,* 119 S.Ct. 1257 (1999). Thus venue over the conspiracy count appears proper at this stage of the proceedings and the motion to dismiss this count for improper venue is denied.

The defendant next argues that venue over counts two through four is improper in the Southern District of New York. He contends that these substantive crimes were committed only in the Eastern District of New York because the essential elements of a violation of 42 U.S.C. § 1320a-7b(b)—receiving kickbacks in return for referrals—all occurred in the Eastern District of New York. The Government responds that the defendant's analysis of the statute does not sufficiently acknowledge the fact that the statute prohibits remuneration *in return for referrals* to a person for the furnishing of items or services for which payment may be made under a Federal health care program. In this case, the "person" to whom referrals were made—Ganesh—was located in the Southern District of New York

and the referrals were arranged with that business in the Southern District of New York. The Government has made it clear that the payments alleged in each of counts two through four were for referrals at least in part to Ganesh in the Southern District of New York.

To determine whether there is venue over the substantive counts, the Supreme Court has recently emphasized that the district court "must initially identify the conduct constituting the offense (the nature of the crime) and then discern the location of the commission of the criminal acts." *United States v. Rodriguez-Moreno,* 119 S.Ct. 1239, 1242-43 (1999); *see also United States v. Cabrales,* 118 S.Ct. 1772, 1775 (1998). The Court may examine the verbs used in the statute to help determine "the nature of the substantive offense" but the so-called "verb test" "cannot be applied rigidly, to the exclusion of other relevant statutory language." *Rodriguez-Moreno,* 119 S.Ct. at 1243. In *Rodriguez-Moreno,* the Supreme Court found that venue was proper in the District of New Jersey for a defendant who allegedly violated 18 U.S.C. § 924(c)(1), which makes it unlawful "during and in relation to any crime of violence . . . to [use or carry] a firearm" because the crime of violence (kidnaping) continued in the District of New Jersey even though it was undisputed that the defendant only used and carried the firearm in Maryland. Similarly, the Court of Appeals for the Second Circuit has described the test for venue as "a substantial contacts rule that takes into account a number of factors—the site of the defendant's acts, the elements and nature of the crime, the locus of the effect of the criminal conduct, and the suitability of each district for accurate factfinding

. . . ." *United States v. Reed,* 773 F.2d 477, 481 (2d Cir.1985).[1] The parties agree that where, as here, the Government has provided the Court with a "full proffer" of the facts it intends to introduce at trial to establish venue, the Court may decide whether venue is proper before trial. *Cf. United States v. Alfonso,* 143 F.3d 772, 776-77 (2d Cir.1998) (stating that unless the government gives "what can fairly be described as a full proffer of the evidence it intends to present at trial," the sufficiency of the evidence cannot be addressed on a pretrial motion to dismiss).

In this case, the statute at issue provides in relevant part that

> whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind—(A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program . . . shall be guilty of a felony . . . .

---

1. The defendant argues that the final two elements of the *Reed* test are no longer applicable after the Supreme Court's decision in *Cabrales.* However, in *Rodriguez-Moreno* the Supreme Court explicitly left open the question whether the effects test, the third element in *Reed,* would be sufficient for venue. *See Rodriguez-Moreno,* 119 S.Ct. at 1243 n. 2. In this case, it is unnecessary to determine the continuing validity of the final two elements of the *Reed* test because venue is established under the first two elements.

42 U.S.C. § 1320a-7b(b)(1)(A). The Government contends that it will demonstrate at trial that in return for remuneration, the defendant referred patients to Ganesh, which is located in the Southern District of New York. The Government further contends that the defendant himself made and caused his staff to make telephone calls to Ganesh in order to make the referrals and that during those telephone calls the defendant or his staff informed Ganesh whether the patients being referred were Medicare recipients. After receipt of the referrals, Ganesh would mail Certificates of Medical Necessity ("CMN") from the Southern District of New York to the defendant in the Eastern District of New York and then the defendant would mail the CMN back to the Southern District. The staff at Ganesh would then arrange for the referred patients to receive the services for which they had been referred.[2]

Under the facts as described in the Government's proffer, venue in the Southern District of New York is proper in this case. Although the parties agree that the remuneration alleged in the substantive counts was received by the defendant in the Eastern District of New York, it is plain that the nature of the offense was such that the defendant took a number of actions that were integral to the offense in the Southern District of New York. In exchange for money, the defendant agreed to and did refer patients to a provider in the Southern

---

2. The Government also points to further acts in the Southern District of New York by which Medicaid reimbursements were in fact made. It is unnecessary to evaluate the significance of these acts, particularly since the statute only requires that the services to be rendered by the provider be eligible for payment by a Federal health care program.

District of New York, for the provision of services and/or items in the Southern District of New York, and the referrals were accomplished through contacts with the provider in the Southern District of New York.

The defendant's contention that the referrals were "made" in the Eastern District because that is where he allegedly told his patients that he was referring them to Ganesh is too narrow an interpretation of the statute. The referral at issue also would have been "made" when the defendant spoke to employees of Ganesh in the Southern District. The statute requires not only the receipt of remuneration but that it be in return for a reference of an individual to the provider of a service or item which may be federally reimbursed. The Government alleges that the defendant made or caused to be made telephone calls to the Southern District of New York in order to make the referrals and then sent paperwork to the Southern District so that Medicare reimbursement could be obtained. Under these circumstances, there is a sufficient nexus between the defendant's crime and the Southern District of New York to support venue in the Southern District. *See, e.g., United States v. Carrizo,* S3 95 Cr. 779, 1996 WL 208186, at *3 (S.D.N.Y. Apr. 26, 1996) (finding that venue over a charge of receipt of commissions or gifts for procuring loans in violation of 18 U.S.C. § 215 was proper in the Southern District of New York even though the defendant physically received a commission or gift in Colorado, where the defendant worked at the New York branch of the bank from which the loan at issue was procured, recommended that the party at issue apply to the New York bank for the loan, spoke with that party by telephone from his New York office, and submitted the loan

applications to the bank's New York office, and where that loan was ultimately approved in New York and dispersed into accounts at the New York bank), *aff'd,* 104 F.3d 356 (2d Cir.1996); *see also United States v. Stephenson,* 895 F.2d 867, 874 (2d Cir.1990) (finding venue over bribery charge proper in the Southern District of New York where defendant was not physically present in the Southern District of New York but made telephone calls into the Southern District to contact the victims of his bribery scheme as "part and parcel of the offense of 'demand[ing]' 'seek[ing],' and 'agree[ing] to receive' a bribe" as prohibited under 18 U.S.C. § 201(b)(2)) (internal citations omitted).[3]

Because venue is proper over each count of the indictment in the Southern District of New York, the motion to dismiss for improper venue is denied.

III.

The defendant next moves pursuant to Federal Rule of Criminal Procedure 7(c) to dismiss the charges in the indictment for failure to state an offense. He contends that

3. The defendant argues that this case is similar to *Cabrales.* In *Cabrales,* the Supreme Court found that venue was improper for money laundering charges in the District of Missouri, where the underlying drug trafficking that produced the proceeds occurred, because the defendant was only charged with the "after the fact" offense of laundering the funds and that laundering began, continued, and was completed in Florida. *See Cabrales,* 118 S.Ct. at 1776. The indictment in this case, however, does not charge an "after the fact" offense but rather contains charges where the act of referral which is integral to the offense is alleged to have occurred in part in this District.

the conspiracy count does not state an offense because there was no agreement in addition to the agreement necessary to violate 42 U.S.C. § 1320a-7b(b)(1), thus making a charge of conspiracy improper. In addition, he contends that counts two through four do not state an offense because the indictment alleges that the defendant accepted "kickbacks" but the only "kickbacks" alleged involved government "sting" money, which cannot constitute a kickback under the law. The Government responds that count one does sufficiently allege an agreement in addition to the agreement necessary to violate the substantive statute and that counts two through four state an offense because a kickback can include government sting money and, in any event, the indictment also alleges that the defendant received "remuneration."

A.

The defendant contends first that the indictment fails to state an offense against him for conspiracy because it alleges no agreement in addition to the agreement necessary to violate 42 U.S.C. § 1320a-7b(b)(1). The Government contends that the indictment does allege such an agreement.

Federal Rule of Criminal Procedure 7(c)(1) provides that an indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." "An indictment is sufficient when it charges a crime with sufficient precision to inform the defendant of the charges he must meet and with enough detail that he may plead double jeopardy in a future prosecution based on the same set of events." *United States v. Stavroulakis,* 952 F.2d

686, 693 (2d Cir.), *cert. denied,* 504 U.S. 926 (1992) (citing *Russell v. United States,* 369 U.S. 749, 763-64 (1962)). Moreover, " 'an indictment need do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime.' " *Stavroulakis,* 952 F.2d at 693 (quoting *United States v. Tramunti,* 513 F.2d 1087, 1113 (2d Cir.), *cert. denied,* 423 U.S. 832 (1975)); *see also United States v. Elson,* 968 F.Supp. 900, 904 (S.D.N.Y.1997). The Court of Appeals for the Second Circuit has also noted that " '[a]n indictment must be read to include facts which are necessarily implied by the specific allegations made.' " *Stavroulakis,* 952 F.2d at 693 (quoting *United States v. Silverman,* 430 F.2d 106, 111 (2d Cir.), *modified,* 439 F.2d 1198 (2d Cir.1970), *cert. denied,* 402 U.S. 953 (1971)).

In this case, the Government has sufficiently alleged a conspiracy in the indictment. *Cf. United States v. Picciotti,* 40 F.Supp.2d 242, 248-49 (D.N.J.1999) (denying a motion for a judgment of acquittal on a charge of conspiracy to violate § 1320a-7b(b) where the Government submitted sufficient evidence to establish that "a conspiracy was formed for the purpose of violating the anti-kickback statute . . . , that [the defendant] willfully became a member of the conspiracy, and that at least one member of the conspiracy performed an overt act in furtherance of the conspiracy"). The language of the indictment roughly tracks the language and the elements of conspiracy under 18 U.S.C. § 371. Moreover the elements of 42 U.S.C. § 1320a-7b(b)(1) and 18 U.S.C. § 371 are not the same. The substantive statute can be violated without the agreement required for a conspiracy to violate the law. For example, as defense counsel

acknowledged at oral argument, mere solicitation of remuneration is sufficient to violate the substantive statute, and a person can receive remuneration without the necessary agreement where he deals with an undercover agent. The cases cited by the defendant to support the proposition that a conspiracy conviction is improper when all that has been proven is a simple buy-sell agreement do not require the dismissal of the conspiracy charge in this case, particularly at this stage of the proceedings. Those cases all concerned simple buyer-seller relationships in the context of illegal narcotics transactions. Further, all of the cases were decided on appeal after the evidence had been presented and the defendant convicted at trial and where the Court was able to assess whether the elements necessary for a conspiracy had been proven. *See, e.g., United States v. Dekle,* 165 F.3d 826 (11th Cir.1999); *United States v. Lennick,* 18 F.3d 814 (9th Cir.), *cert. denied,* 513 U.S. 856 (1994); *United States v. Lechuga,* 994 F.2d 346 (7th Cir.), *cert. denied,* 510 U.S. 982 (1993); *United States v. Morris,* 836 F.2d 1371 (D.C.Cir.1988). In sum, the indictment adequately alleges a conspiracy to violate 42 U.S.C. § 1320a-7b(b) and the motion to dismiss it for failure to state an offense is thus denied.

B.

The defendant next moves to dismiss counts two through four of the indictment for failure to state an offense under 42 U.S.C. § 1320a-7b(b). The defendant argues that these three substantive counts fail to state an offense because each is predicated on an alleged former co-conspirator offering, and the defendant accepting, government "sting" money. The defendant contends that government sting money cannot

be a kickback and therefore, because the indictment specifically alleges that the defendant received "kickbacks," there is no criminal violation stated in the indictment. The Government responds that government sting money can constitute a kickback, and in any event the statute criminalizes the receipt of "remuneration" not simply kickbacks.

The defendant relies principally on two cases—*United States v. Zacher* and *United States v. Porter*—for the proposition that a "kickback" cannot include government sting money. *Zacher* defined a bribe, kickback, or rebate for purposes of 42 U.S.C. § 1396h(b) (1972)—the predecessor statute to 42 U.S.C. § 1320a-7b—as "a corrupt payment or receipt of payment in violation of the duty imposed by Congress on providers of services to use federal funds only for intended purposes and only in the approved manner." *United States v. Zacher,* 586 F.2d 912, 916 (2d Cir.1978). The Court of Appeals found that a supplemental payment by a patient's family to a Medicaid provider was not a "bribe." Similarly, in *Porter,* the Court of Appeals for the Fifth Circuit defined the term "kickback" as used in 42 U.S.C. § 1395nn(b) as "the secret return to an earlier possessor of part of a sum received." *United States v. Porter,* 591 F.2d 1048, 1054 (5th Cir.1979). The Court found that payments by a laboratory to doctors who sent blood samples to it were not kickbacks.[4]

---

4. The interpretation of "kickback" in *Porter* is narrower than that used by other Courts of Appeals. *See United States v. Greber,* 760 F.2d 68, 72 (3d Cir.), *cert. denied,* 474 U.S. 988 (1985); *United States v. Tapert,* 625 F.2d 111, 121 (6th Cir.), *cert. denied,* 449 U.S. 1034 (1980); *United States v. Hancock,* 604 F.2d 999, 1002 (7th Cir.), *cert. denied,* 444 U.S. 991 (1979).

Neither of these cases defined the term "kickback" in the context of deciding whether government sting money could constitute a kickback and neither decided that the payment of government money in a sting operation could not be a kickback.

Moreover, in *United States v. Myers*, 635 F.2d 932 (2d Cir.), *cert. denied*, 449 U.S. 956 (1980), the Court of Appeals for the Second Circuit held that the fact that government sting money was used to bribe a member of Congress did not undermine a prosecution for bribery because "the offense described by [18 U.S.C.] § 201 is complete upon a Congressman's corrupt acceptance of money in return for his promise to perform any official act. The elements of the offense are the receipt of money, the making of the promise, and the corrupt purpose with which these things are done. . . . The promise does not cease to relate to an official act simply because the undercover agent offering the bribe knows that the subject of the promised legislative action is fictitious and that the promise will not actually be performed." *Myers*, 635 F.2d at 940. Similarly, here the violation of 42 U.S.C. § 1320a-7b(b)(1)(A) was accomplished when the defendant allegedly received the money in return for referring an individual to a person for the furnishing or arranging of any item or service for which payment may be made under a Federal health care program. The receipt of the money for referring the patient did not lose its illegal character simply because the government agent knew that the kickback money was actually government sting money and the patient referrals might never be completed. *Cf. United States v. Duz-Mor Diagnostic Lab., Inc.*, 650 F.2d 223, 227 n. 5 (9th Cir.1981) (noting in a case brought under the predecessor statute to § 1320a-7b that offering a bribe in exchange for a referral of

patients for services reimbursable under, for example, Medicare, was still a violation of the statute even though the person to whom the bribe was offered was a government informant who could never have made the requested referral).

Even if a kickback could not by definition be comprised of government sting money, § 1320a-7b(b) also explicitly prohibits the receipt of "remuneration." Remuneration on its face is a broader term than "kickback" and would encompass any money received in exchange for a referral. *Cf. United States v. Greber,* 760 F.2d 68, 71-72 (3d Cir.1985) (noting that "[b]y adding 'remuneration' to the statute in the 1977 amendment, Congress sought to make it clear that even if the transaction was not considered to be a 'kickback' for which no service had been rendered, payment nevertheless violated the Act."). The defendant contends that the Government cannot rely on the term "remuneration" because the Government specifically alleges in the indictment that the money received by the defendant was in the form of "kickbacks." However, the indictment does allege as part of counts two through four that the defendant received "remuneration, including kickbacks", (Ind.¶ 14.), and the indictment later refers to the specific instances of remuneration as "payment", (Ind.¶ 14), although the defendant is correct that the indictment specifies in the same paragraph that the defendant received "kickbacks." (Ind.¶ 14.)

In any event, whether the defendant is specifically charged with receiving kickbacks or remuneration is immaterial in this case. The defendant is plainly on notice about the criminal actions he is alleged to have taken in counts

two through four—namely receiving specific payments detailed in the indictment in return for referring Medicare patients to Ganesh and American Open. Whether that money was remuneration or a kickback is irrelevant here where accepting either remuneration or kickbacks is prohibited under the statute and allegations of both receiving remuneration and kickbacks are contained in the indictment. In a case such as this, there would be no material variance or a constructive amendment of the indictment if the Government proved at trial that the defendant accepted remuneration, rather than kickbacks, on the dates and in the amounts alleged in counts two through four in return for referring patients as prohibited under the statute. Such evidence would not constitute a variance with the indictment because the defendant has been given "notice of the core of criminality to be proven at trial" and he could experience no "substantial prejudice" if he were convicted of committing the same acts alleged in the indictment but with the term "remuneration" instead of "kickback" attached to them. *See United States v. Wallace*, 59 F.3d 333, 338 (2d Cir.1995) (discussing requirement for finding a variance and stating that a variance "will furnish the ground for overturning a verdict only if the defendant first shows that the variance resulted in substantial prejudice") (internal citations and quotation marks omitted).

Nor would a conviction for receiving "remuneration" rather than "kickbacks" constitute a constructive amendment of the indictment. A constructive amendment, which is considered to be per se prejudicial, occurs where "the terms of the indictment are in effect altered by the presentation of evidence . . . which so modifies the essential elements of the

offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment." *United States v. Writers & Research, Inc.*, 113 F.3d 8, 12 (2d Cir.1997). Again, here the grand jury charged the defendant with accepting "remuneration, including kickbacks" in the first part of the fourteenth paragraph of the indictment, and then only "kickbacks" in the second part of that same paragraph. The facts that are alleged in the indictment and that the Government contends it will prove at trial are identical whether the money the defendant allegedly received is termed "remuneration" or "kickbacks." Under these circumstances, proof of remuneration at trial would not constitute a constructive amendment of the indictment. Thus the defendant's motion to dismiss counts two through four for failure to state an offense is denied.

III.

The defendant next moves pursuant to Federal Rule of Criminal Procedure 7(f) for a bill of particulars 1) with respect to Count One, identifying where the defendant and his co-conspirators allegedly entered into the conspiratorial agreement, 2) with respect to Count One, identifying where the defendant allegedly received the kickbacks charged in the indictment ¶ 12, 3) with respect to counts two through four, identifying what conduct relevant to venue allegedly occurred in the Southern District, and 4) with respect to counts two through four and the overt acts alleged in count one, identifying which patient referrals were allegedly made in return for the kickbacks prohibited by 42 U.S.C. § 1320a-7b(b)(1).

Appendix C

The decision whether to grant a bill of particulars pursuant to Rule 7(f) rests with the sound discretion of the district court. *See United States v. Cephas,* 937 F.2d 816, 823 (2d Cir.1991), *cert. denied,* 502 U.S. 1037 (1992); *United States v. Panza,* 750 F.2d 1141 (2d Cir.1984); *United States v. Strawberry,* 892 F.Supp. 519, 526 (S.D.N.Y.1995). A bill of particulars enables a defendant "to prepare for trial, to prevent surprise, and to interpose a plea of double jeopardy should he be prosecuted a second time for the same offense." *United States v. Bortnovsky,* 820 F.2d 572, 574 (2d Cir.1987). A bill of particulars is required "only when the charges of the indictment are so general that they do not advise the defendant of the specific acts of which he is accused." *United States v. Torres,* 901 F.2d 205, 234 (2d Cir.), *cert. denied sub nom. Cruz v. United States,* 498 U.S. 906 (1990) (citation omitted); *see also Cephas,* 937 F.2d at 823; *Panza,* 750 F.2d at 1148. "Generally, if the information sought by the defendant is provided in the indictment or in some acceptable alternate form, no bill of particulars is required." *Bortnovsky,* 820 F.2d at 574; *see United States v. Barnes,* 158 F.3d 662, 665 (2d Cir.1998); *see also United States v. Szur,* No. 95 Cr. 108, 1998 WL 132942, at *11 (S.D.N.Y. Mar. 20, 1998).

In this case, the defendants are not entitled to a bill of particulars. The charges in the indictment concerning count one are straightforward and, coupled with the discovery provided by the Government and the ample time to review that discovery, sufficiently advise the defendant of the specific acts of which he is accused. *See United States v. Muyet,* 945 F.Supp. 586, 599 (S.D.N.Y.1996); *United States v. Ruiz,* 702 F.Supp. 1066, 1070-71 (S.D.N.Y.1989), *aff'd,* 894 F.2d 501 (2d Cir.1990). In addition, at argument on these

motions, the Government represented to the Court that it had already provided the defendant with a list of the patients whom the defendant allegedly referred in violation of § 1320a-7b(b). This information need not be provided again in a bill of particulars.

Moreover, "since the government is not required to prove exactly when or how a conspiracy was formed or when or how a particular defendant joined the scheme, and as the circumstantial proof on which the government usually relies to prove the existence of a scheme does not reveal such details, the courts have consistently rejected demands for particulars as to the formation of a conspiracy or the entry into the conspiracy of a particular defendant or confederate." *United States v. Matos-Peralta,* 691 F.Supp. 780, 791 (S.D.N.Y.1988); *see also United States v. Pacheco,* 902 F.Supp. 469, 474-75 (S.D.N.Y.1995); *United States v. Thomas,* 94 Cr. 835, 1995 WL 312481, at *1 (S.D.N.Y. May 22, 1995). Thus to the extent the defendant seeks information about the place where the conspiracy alleged in count one was entered into, he is not entitled to that information.

With respect to counts two through four, the need for a bill of particulars has been mooted. The defendant requested information about the facts that support venue over those counts and the identity of patients that were allegedly referred in return for the kickbacks alleged in those counts. However, the Government provided the defendant and the Court with sufficiently particularized information about those issues in its letter dated June 14, 1999. The letter indicates to which companies referrals were allegedly made in exchange for each of the payments charged in counts two through four.

The letter also indicates that "tally sheets", which appear to have been produced to the defendant, list the names of the patients for which referrals were allegedly made in exchange for each of the three charged payments. The Government also restates in the letter with sufficient particularity the facts that it contends will establish venue at trial. "If after the Government's case, the proof fails to establish venue as properly outlined in the bill of particulars, the [defendant is] invited to renew [his] venue objections pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure." *United States v. Mapp,* 95 Cr. 1162, 1996 WL 506933, at *12 (E.D.N.Y. Sept. 3, 1996). At this stage, however, the defendant's motion for a bill of particulars is denied.

IV.

Finally, the defendant moves to exclude any evidence offered pursuant to Federal Rule of Evidence 404(b), to exclude so-called "tally sheets" from evidence, to conduct an audibility hearing on a number of audio tapes, and to require the production of all *Brady, Giglio,* and Jencks Act material.

All of these issues appeared to be resolved at oral argument. The Government agreed to provide notice to the defense at least 10 days before trial of any 404(b) evidence it intends to offer, which is sufficient. The Government also indicated that it is uncertain whether it will seek to introduce the tally sheets at trial. Thus the Government is directed not to refer to the tally sheets until a further ruling from the Court. In addition, both parties agreed that an audibility hearing should be conducted once the Government decides which

tapes it plans to introduce at trial. The Government should promptly provide transcripts of the tapes to the Court and defense counsel and the Court will then schedule an audibility hearing.

In addition, the Government represents that it is aware of its obligations under *Brady v. Maryland,* 373 U.S. 83 (1963) and will produce any *Brady* material to the defense. This representation is sufficient. *See, e.g., United States v. Jennings,* 5-98-CR-418, 1998 WL 865617, at *3 (N.D.N.Y. Dec. 8, 1998); *United States v. Szur,* 97 Cr. 108, 1998 WL 132942, at *15 (S.D.N.Y. Mar. 20, 1998). Similarly, the Government has indicated that it is aware of its obligations under *Giglio v. United States,* 405 U.S. 150 (1972) and the Jencks Act and that it will provide the required information to the defendant three weeks before trial, which is sooner than the Government is required to make such information available. Again, this representation is sufficient to comply with the Government's obligations. *See, e.g., United States v. Velasquez,* S9 96 Cr. 126, 1997 WL 414132, at *6 (S.D.N.Y. July 23, 1997); *Szur,* 1998 WL 132942, at *15. To the extent the defendant moves to require the production of such information sooner than the above-stated times, the motion is denied.

Appendix C

Conclusion

The defendant's motion to dismiss the indictment for improper venue is denied. The defendant's motion to dismiss the indictment for failure to state an offense is denied. The defendant's motion for a bill of particulars is denied. The defendant's remaining motions are moot, and to the extent they are not moot they are denied.

SO ORDERED.

APPENDIX D — CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides, in pertinent part, as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law . . .

The Sixth Amendment provides, in pertinent part, as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.